Filed 5/22/12 P. v. Gomez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR DAVID GOMEZ, Defendant and Appellant.	B224539 (Los Angeles County Super. Ct. No. NA072103)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Affirmed as modified.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Oscar David Gomez appeals from his first degree murder conviction, contending evidence of guilt was insufficient and the trial court made evidentiary, instructional and sentencing errors and erred in denying his motion to represent himself. We conclude defendant's sentence must be modified and the abstract of judgment corrected, but otherwise affirm.

BACKGROUND

On October 15, 2007, 51-year-old David Franklin, a Black man, and Chandra M. were on a walkway in the Rancho San Pedro housing development when Franklin was attacked by defendant and another assailant, both members of the Rancho San Pedro street gang. The attackers knocked Franklin down and stomped on and kicked his head several times, and one or both yelled, "'Fuck this nigger, fuck this nigger.'" When neighbors told defendant to stop, he said he was trying to wake Franklin up. He then dragged the victim a short distance and continued to hit him in the head. Eventually defendant departed, leaving Franklin lying on the ground, unconscious and choking. Franklin never regained consciousness and later died from massive brain hemorrhaging. According to the autopsy, he suffered deep bruising to the face, nose and side of the head, but no other injuries.

The murder was witnessed by the sisters Jessica and Amy R. and by Alejandro M. Jessica R. identified defendant as one of the assailants in a photographic lineup and at trial, although she was reluctant to appear as a witness because she had been warned by defendant's associates not to testify. Amy R. identified defendant at trial as one of the assailants, although she had also been warned not to testify. Alejandro M. also identified defendant in a photographic lineup and at trial.

Five days after the attack, defendant was found with his girlfriend, Francisca Carmona, hiding in a crawlspace in a residence in the Rancho San Pedro housing project. He was arrested. Antonio Gomez, defendant's brother, was found hiding in a closet in the same residence.

In late January 2008, two days before defendant's preliminary hearing, Francisca Carmona and Antonio Gomez went to Jessica and Amy R.'s house and told Edgar R.,

their father, that if Jessica R. testified against defendant the gang would "shoot [his] family and house." When Debra B., Edgar's neighbor, protested, Carmona punched her in the face, knocking her to the ground, and continued to hit and kick her while she was on the ground. Police moved Edgar and his family to a hotel that night and kept them in hotels for several months.

On May 11, 2009, ten months before trial, the trial court granted defendant's request to represent himself. Two months later, the court granted his request to terminate his *pro se* status. On the second day of trial defendant again requested leave to represent himself. This request was denied.

At trial, City of Los Angeles police officers testified that the Rancho San Pedro street gang, a Hispanic gang comprising approximately 500 members, claimed the Rancho San Pedro housing development as its territory. Los Angeles Police Officer Maligi Nua testified as an expert about gangs in San Pedro, the Rancho San Pedro gang in particular. Rancho San Pedro engages in illicit drug sales, assaults on rival gang members, murder and attempted murder. The gang coexisted in the Rancho San Pedro housing development with a Black gang, the Dodge City Crips, until 1996, when a Dodge City Crip member was murdered at the housing development. Assaults and homicides between the two gangs followed, continuing for ten years, until Rancho San Pedro "won" "the fight for the Rancho San Pedro housing development." Although the Dodge City Crips were no longer a presence at the development, a recent influx of African-American families had resulted in a rise in anti-Black graffiti scripted by Rancho San Pedro.

When presented with a hypothetical based on the facts of the assault in this case, the prosecution's expert opined that the assault would have benefitted the Rancho San Pedro gang, as the gang is "still sending that message to the African-American population in the housing development, as well as the Dodge City Crip gang members, that this Rancho San Pedro housing development belongs to Rancho San Pedro. [¶] As they continue to assault people there, people will become in fear, and they will—they have a tendency no longer to cooperate with police. And it allows the Rancho San Pedro to continue—continually promote openly and act out in the Rancho San Pedro housing

development, selling [i]llicit drugs for financial gain, as well as to obtain respect within Harbor area in the gang culture itself." Even though the assault did not involve a rival gang member, it would benefit Rancho San Pedro because "[i]t shows the ruthlessness of these gang members. They will stop at no end to reach their goal of being known as a terrorizing street terrorist organization. There is no—they have no boundary as to any of the people that they will assault. So by people knowing this, the common reasonable citizen in the housing development is in fear."

Defendant was found guilty of first degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found true the allegations that the murder was willful, deliberate, and premeditated; that defendant committed a hate crime voluntarily and in concert with another person (§ 422.75, subd. (b)); that the offense was committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)); and that the victim was intentionally killed because of his race (§§ 190.03, subd. (a), 190.2, subd. (a)(16)). Defendant was sentenced to life in prison without the possibility of parole, plus ten years for the gang enhancement, and was ordered to pay a $10,000 parole revocation fine.

DISCUSSION

A. Self-Representation

Defendant first contends the trial court abused its discretion when it denied his second motion to represent himself.

On March 23, 2010, the second day of jury selection, defendant stated, "I have kind of a request. I know that this is somewhat of a short notice. I mean, the time being that the case—" The trial judge asked, "What is it you want?" Defendant replied, "I was wondering, I tried to go pro per on May 11th, 2009, and I never made it to the pro per module, or never got the—was never being able to go to the law library and phone calls, and actually it's on record. I asked you –" The judge again interrupted, "Sir, what is it you would like today?" Defendant said, "I was wondering if I could invoke my

[1] Undesignated statutory references will be to the Penal Code.

Faretta[**2**] rights and go pro per." The trial court denied the request, stating, "It's discretionary. We're in the second day of the jury selection. It is too late." The court later added, "I wanted to make one more finding with respect to [defendant's] request to go pro per. I also find it was dilatory and an attempt to delay the proceedings[.]"

The Sixth Amendment of the federal Constitution affords a defendant the right to conduct his or her own defense. (*Faretta v. California*, *supra*, 422 U.S. at pp. 835-836.) The right is not self-executing, but must be unequivocally invoked a reasonable time prior to the commencement of trial. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128.) When a timely, unequivocal motion to proceed *pro se* is made, "a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*Id.* at p. 128; *People v. Marshall* (1997) 15 Cal.4th 1, 21 [assertion of the right must be articulate and unmistakable]; see *People v. Lynch* (2010) 50 Cal.4th 693, 722, abrogated on another ground as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.) The court must "determine whether the defendant truly desires to represent himself or herself," and may deny a request for self-representation that is ambivalent or made out of mere impulse or a temporary whim. (*People v. Marshall*, at p. 23.) The court should "evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*Ibid.*)

On the first day of trial, defendant stated he had "kind of a request" and "was wondering" if he could invoke his right to self-representation. These statements do not unambiguously reflect defendant's sincere desire to forego counsel and defend himself.

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2 *Faretta v. California* (1975) 422 U.S. 806.

"As one court observed: '[T]he right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*.' [Citation.]" (*People v. Marshall*, *supra*, 15 Cal.4th at p. 21.) The rule protects the courts against "clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation. Without a requirement that a request for self-representation be unequivocal, such a request could, whether granted or denied, provide a ground for reversal on appeal. This problem has irked many courts . . . ." (*Id*. at p. 22.)

Defendant had invoked his right of self-representation earlier in the proceedings but relinquished the right a short time later, apparently having made no progress in shouldering the defense. He then waited ten months, to the day of trial, to try again, with no explanation why the first attempt was unsuccessful, no complaint about his current representation, and no justification for the delay. The phrasing of the request (if it was a request) was the picture of ambivalence. The trial judge was eminently justified in finding the request to constitute merely a ploy to delay proceedings.

Defendant argues the trial court failed to conduct a proper inquiry into the factors to be considered when ruling on a *Faretta* request as required by *People v. Windham*, *supra*, 19 Cal.3d 121. No such inquiry was necessary. Once trial has commenced, self-representation is no longer an unconditional right but may be permitted in the trial court's discretion. In exercising that discretion the court must consider "the specific factors underlying the request," such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Id*. at p. 128; *People v. Jenkins* (2000) 22 Cal.4th 900, 959.) It need hardly be said that before considering factors underlying a request for self-representation there must *be* a request, and it must be unequivocal. (*People v. Windham*, at pp. 127-128.) Absent such a request, the trial court could not find the defendant had waived the right to counsel no matter how a *Windham* inquiry would have turned out. To do so would violate the defendant's Sixth Amendment right to counsel.

Defendant's "wondering" whether he could represent himself did not represent an unequivocal invocation of the right of self-representation. The trial court therefore had no cause to examine the *Windham* factors.

B. Evidence of Witness Intimidation

Over defendant's objection the trial court allowed the prosecution to introduce evidence regarding the attack on Debra B. by Francisca Carmona and Antonio Gomez, ruling that the incident was relevant to the credibility of Jessica and Amy R. and to the gang enhancement allegations. Edgar R. testified about the attempt to intimidate his family and the assault on Debra B, and the prosecution presented photographs depicting Debra B.'s injuries.

Defendant contends the court abused its discretion under Evidence Code section 352 in failing to find that the probative value of the evidence was outweighed by the undue prejudice it created. We disagree.

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) But relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will consume an undue amount of time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. (Evid. Code, § 352.) "The trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value." (*People v. Horning* (2004) 34 Cal.4th 871, 900.) A court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. De Santis* (1992) 2 Cal.4th 1198, 1226.)

Evidence of a third party's attempt to intimidate a witness is not generally admissible to show a defendant's consciousness of guilt unless there is reason to believe the defendant was involved in the intimidation. (*People v. Abel* (2012) 53 Cal.4th 891, 924.) But "'"[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is

well within the discretion of the trial court. [Citations.]"'" [Citation.] "'Moreover, evidence of a "third party" threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant.'" [Citation.]"'" (*Id*. at p. 925; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369.)

The credibility of Jessica and Amy R. was a significant issue in this case, as both identified defendant as the person who assaulted Franklin. The evidence that defendant's associates had attempted to intimidate them therefore had substantial probative value.

The evidence was not unduly prejudicial. "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Here, the evidence that defendant's close associates intimidated witnesses was certainly prejudicial in that it tended in reason to prove the gang enhancement allegation. But the evidence was not such as would uniquely tend to evoke an emotional bias against defendant as an individual. First, the prosecution did not contend that defendant directed or authorized the intimidation and the jury was not instructed with CALJIC No. 2.06 regarding a defendant's efforts to suppress evidence. Second, the evidence was no more inflammatory than other evidence—eyewitness testimony—that tied defendant to the crime alleged. Under these circumstances, we cannot find the trial court abused its discretion in admitting the evidence of witness intimidation.

C. Implied Malice Second Degree Murder

Defendant contends the trial court prejudicially erred in failing to instruct on "implied malice" second degree murder. By giving only an express malice instruction, defendant argues, the court left the jury with no option but to find the murder was deliberate and premeditated, because express malice requires an intent to kill, and intent to kill requires deliberation and premeditation. The contention is without merit.

The trial court must instruct sua sponte on relevant principles of law, including particular defenses if substantial evidence supports them and is not inconsistent with defendant's theory of the case. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1199.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Murder that is deliberate and premeditated is murder of the first degree. (CALJIC No. 8.20.) Murder accompanied by intent and malice but not deliberation and premeditation is murder of the second degree. (CALJIC No. 8.30.)

In the case of either first or second degree murder, the requisite malice may be express or implied. (§ 188.) Express malice is manifested by a deliberate intention to take away life. Implied malice is "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid*.) Thus, express malice murder requires an intent to kill. Implied malice murder requires merely an intent to do some act the natural consequences of which are dangerous to human life. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.)

The trial court instructed the jury on first degree murder, second degree murder, and malice. When instructing on malice, the court gave the portion of CALJIC No. 8.11 that defines express malice—intent to kill—but omitted portions referring to implied malice.[3] Of particular note, the court instructed that "malice aforethought does not

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[3] CALJIC No. 8.11 instructs:

"'*Malice*'" *may be either express or implied.* [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] *Malice is implied when:* [¶] *1. The killing resulted from an intentional act;* [¶] *2. The natural consequences of the act are dangerous to human life; and* [¶] *3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.* [¶] When it is shown that a killing resulted from the intentional doing of an act with express *or implied* malice, no other mental state need be shown to establish the mental state of malice aforethought. [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act." (Italics added.)

In its instruction, the trial court omitted the italicized material.

necessarily require any ill will or hatred of the person killed. The word 'aforethought' *does not imply deliberation* or the lapse of considerable time; it only means that the required mental state must precede rather than follow the act." (Italics added.)

The court instructed on first degree murder, as follows: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. [¶] The word 'willful' as used in this instruction means intentional. [¶] The word 'deliberate,' which relates to how a person thinks, means formed or arrived at or determined upon as a result of careful thought and weighing of the considerations for and against the proposed course of action. [¶] The word 'premeditated' relates to when a person thinks, and means 'considered beforehand.' One premeditates by deliberating before taking action."

On second degree murder, the court instructed, "Murder of the second degree is also the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being, but the evidence is insufficient to prove deliberation and premeditation."

Defendant argues the trial court's failure to instruct on implied malice "backed the jury into a finding" that the murder was premeditated and deliberate. We disagree. First, nothing about the court's instruction on malice required the jury to find that the murder was premeditated and deliberate, as the three concepts—malice, premeditation and deliberation are distinct. The word "malice" pertains to a state of mind. "Deliberate" relates to how the state of mind is formed. "Premeditated" relates to when the state of mind is formed. The trial court's instruction that malice equates with intent did not require the jury to find deliberation and premeditation, i.e., first degree murder. On the contrary, the court instructed that the word "aforethought" in the phrase "malice aforethought" does *not* imply deliberation.

Second, the jury necessarily decided the implied malice issue adversely to defendant under another instruction. The court elsewhere instructed that to find a hate-murder special circumstance, the jury had to find the killing was intentional, i.e., that the

defendant harbored express malice toward the victim. (§ 190.2, subd. (a)(16).)[4] When the jury found the hate-murder allegation true, it necessarily found defendant harbored express, not implied, malice toward Franklin. Any "'[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.' [Citation.]" (*People v. Blair* (2005) 36 Cal.4th 686, 747.)

As stated by our Supreme Court, "in view of the jury having found a premeditated, deliberate, first degree murder, any error in failing to instruct on implied-malice second degree murder would clearly be harmless. [Citation.] Accordingly, we need not and do not decide whether, on the particular facts of this case, the court should have instructed on second degree 'implied malice' murder." (*People v. Jackson, supra,* 49 Cal.3d at p. 1199.)

D. Sufficiency of Evidence of Premeditation and Deliberation

Defendant contends that there was insufficient evidence of premeditation and deliberation to support a verdict of first degree murder. We disagree.

In reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the prosecution and draw all reasonable inferences in support of the verdict, upholding the judgment if any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Jackson, supra,* 49 Cal.3d at pp. 1199-1200.)

"[T]hree categories of evidence . . . might sustain a finding of premeditated murder: (1) facts about a defendant's behavior before the killing that show prior planning; (2) facts about defendant's conduct with the victim from which the jury could infer a motive; and (3) facts about the manner of the killing from which the jury could

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[4] Section 190.2 provides in pertinent part: "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶ . . . ¶] (16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin."

infer that the defendant intentionally killed the victim according to a preconceived plan." (*People v. Jackson, supra*, 49 Cal.3d at p. 1200.) "[P]remeditation can occur in a very brief period of time." (*Ibid*.) Here, the record shows evidence of premeditation pertaining to at least two of the three categories. As to motive, the evidence establishes that defendant shouted "Fuck this nigger" during the attack, suggesting he bore racial animus toward Franklin. The law does not require a strong or rational motive; anger over any action or trait of the victim may suffice. (See *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102.)

The manner of killing also evidences reflection. Defendant attacked Franklin from behind with no provocation and struck only to the head, including stomping on Franklin's head several times when he was down. This suggests defendant contemplated killing Franklin at least as early as his approach to the victim. He did not stop the attack when told to do so by neighbors, but had the presence of mind to dissemble about trying to wake the victim and the determination to drag him a distance away before continuing the assault. From these facts a reasonable jury could find defendant had formed a plan to kill Franklin and intended to carry it through.

We conclude substantial evidence exists from which a rational jury could have found beyond a reasonable doubt that Franklin's killing constituted willful, premeditated and deliberate first degree murder.

E. Sufficiency of Gang Evidence

The jury found defendant violated section 186.22, subdivision (b)(1), which prescribes an enhanced penalty for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." As a result of the finding, the trial court sentenced defendant to an additional ten years, stayed, pursuant to section 186.22, subdivision (b)(1)(C).

Defendant contends the evidence was insufficient to satisfy the gang enhancement because there was no evidence the murder was committed with the specific intent to promote, further, or assist criminal conduct by the gang. The contention is without merit.

Section 186.22, subdivision (b)(1) "does not criminalize mere gang membership; rather, it imposes increased criminal penalties only when the criminal conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' a group that meets the specific statutory conditions of a 'criminal street gang,' but also with the 'specific intent to promote, further, or assist in any criminal conduct by gang members." (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.) Not every crime committed by gang members is intended to benefit the gang. But "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar* (2010) 51 Cal.4th 47, 68.) The elements must be established beyond a reasonable doubt by substantial evidence. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

Here, there was substantial evidence that defendant intended to murder Franklin and was assisted in the murder by a fellow Rancho San Pedro member. There was also evidence that the crime benefited the Rancho San Pedro gang. Nua testified that by committing crimes in the Rancho San Pedro housing development the gang is sending a message to the residents and to the Dodge City Crip gang that the housing development is Rancho San Pedro territory. When gang members assault African-Americans in the housing development they enhance the gang's reputation by raising the level of fear in the community, which deters residents from cooperating with police. This permits the gang to continue to "act out in the Rancho San Pedro housing development, selling [i]llicit drugs for financial gain, as well as to obtain respect within Harbor area in the gang culture itself." Even though the murder of Franklin did not involve a rival gang member, it would benefit Rancho San Pedro because "[i]t shows the ruthlessness of these gang members. They will stop at no end to reach their goal of being known as a terrorizing street terrorist organization. . . . [T]hey have no boundary as to any of the people that they will assault. So by people knowing this, the common reasonable citizen in the housing development is in fear."

"Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*People v. Albillar, supra*, 51 Cal.4th at p. 63.) Because substantial evidence established that defendant intended to and did murder Franklin in concert with a known member of his gang, and the murder would benefit the gang, the jury could fairly infer he had the specific intent to promote, further, or assist criminal conduct by the gang.

F. Sufficiency of Hate-Murder Special Circumstance Evidence

Defendant contends the evidence is insufficient to sustain the hate-murder special-circumstance finding that he murdered Franklin because of his race, color, religion, nationality, or country of origin (§ 190.2, subd. (a)(16)). We again apply the deferential substantial evidence test, reviewing "the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could find the essential elements of the hate-murder special-circumstance allegation beyond a reasonable doubt. [Citation.] We do not reweigh evidence or reassess a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 37.)

Section 190.2, subdivision (a), provides that a defendant found guilty of first degree murder shall be sentenced to death or imprisonment for life without possibility of parole if the trier of fact finds one of the special circumstances enumerated under that provision. The hate-murder special circumstance applies if the trier of fact finds "[t]he victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin." (§ 190.2, subd. (a)(16).) "[T]he bias motivation must be a cause in fact of the offense, whether or not other causes also exist. [Citation.]. . . . When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime." (*In re M.S.* (1995) 10 Cal.4th 698, 719.) "[T]he Legislature has not sought to punish offenses committed by a person who entertains in some degree racial, religious or other bias, but whose bias is not what motivated the offense; in that situation, it cannot be said the offense was committed *because of* the bias." (*Ibid.*)

The jury reasonably could infer from the evidence that Franklin was murdered because of his race. Defendant is a member of Rancho San Pedro, a criminal street gang engaged in a territorial battle against African-Americans at the Rancho San Pedro housing development. In concert with another Rancho San Pedro member, and with no provocation, he attacked and killed Franklin, an African-American, shouting "Fuck this nigger, fuck this nigger." From these facts a jury reasonably could infer that Franklin's race was a substantial factor motivating the killing, within the meaning of section 190.2, subdivision (a)(16).

Defendant argues the evidence of racial epithets alone did not make the attack on Franklin a hate crime, and at best the evidence is only suggestive of defendant's racial bias. The argument is without merit. First, evidence of defendant's use of an epithet during the murder was not the sole indicator of his hate-based motive. There was also evidence that he was a member of a criminal street gang, that the gang was engaged in a turf battle with a rival African-American gang, and that defendant committed the murder in concert with a fellow gang member for the benefit of the gang. Even absent such evidence, we think use of a racial epithet alone can be sufficient to support a hate crime finding. When defendant shouted "Fuck this nigger," he in effect described not only his opinion of Franklin, what he was doing and why—he was killing a subhuman because he was Black. A reasonable jury could find defendant's words accurately described his thoughts.

G. Exclusion of Defendant's Gang Expert's Testimony

During opening argument, defendant's counsel told the jury that Dr. Malcolm Klein, a sociologist, would be called to give "his opinion as to gangs and membership and the culture of gangs and how it's related to this incident." Dr. Klein had studied street gangs extensively, writing several books and papers on them, but was not familiar specifically with the Dodge City Crips or Rancho San Pedro gang, nor any other San Pedro gang. When asked what help Dr. Klein could be to the jury, defense counsel stated he would "make an observation on gang activity." Dr. Klein had "helped write [section 186.22], and . . . based upon the case history, the way gangs react to trying to curtail the

gang behavior—certainly the activities of one gang in the Los Angeles area of the same ethnic group and gangs in general, . . . their activities are, he can make a determination based on the facts of the case given to him as to whether or not he has an opinion whether this was a gang crime or wasn't a gang crime, as to whether or not this is for the benefit of a gang."

The trial court found Dr. Klein was not qualified as an expert on any relevant issue and sustained the prosecution's objection to his testimony. Defendant argues the court prejudicially erred.

The Attorney General preliminarily argues defendant has waived the contention for failure to make an offer of proof at trial. We agree.

"An appellate court may not reverse a judgment because of the erroneous exclusion of evidence unless the 'substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.' [Citations.]" (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.) The offer of proof requirement not only gives the trial court the opportunity to change its ruling in the event it is unclear how the evidence will assist the jury, it enables an appellate court to assess prejudice. (*People v. Whitt* (1990) 51 Cal.3d 620, 648.) Without an offer of proof, no evaluation of prejudice is possible.

Defendant did not make an offer of proof. He represented only that Dr. Klein would give "his opinion as to gangs and membership and the culture of gangs and how it's related to this incident," "make an observation on gang activity," and determine "whether or not he has an opinion whether this was a gang crime or wasn't a gang crime, as to whether or not this is for the benefit of a gang." The substance of Dr. Klein's proposed testimony, including his specific conclusions and any foundation he would have laid for them, is unknown.

We do not agree with the trial court that a gang expert must have personally researched the specific gang at issue in a trial before being permitted to testify. (See *People v. Murphy* (1963) 59 Cal.2d 818, 829 ["trial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of

evidence as well as in determining its weight"].) But we cannot know whether Dr. Klein's testimony would have influenced the guilt determination here because we do not know what the testimony would have been.

Defendant argues Dr. Klein would have testified that the attack on Franklin did not fit into a pattern of criminal gang activity and would not have been committed for the benefit of a gang. We find no support in the record for the argument, and defendant cites none.

H. Exclusion of Defendant's Character Witnesses

Before trial, defendant's counsel informed the court that he intended to call Andrew Smith and Leah Tiller to testify. Counsel represented that Smith and Tiller, who were African-American, were defendant's next-door friends. They would testify "as to their relationship" with defendant "and with regard to the issue of racism." Counsel had spoken with them a week prior but they had not been subpoenaed. Counsel intended to try to have them subpoenaed.

During trial, although defendant's counsel stated the witnesses would testify regarding defendant's relationship with them as African-Americans, he had neither subpoenaed nor finished interviewing them. When the trial court asked for a statute or case law authorizing the admission of their testimony, defense counsel was unable to provide any but promised he would "try to get them for you at lunchtime, your honor, or before we leave today." The court stated, "So right now I don't see that it's admissible. The only reason I bring that up is because if you show me case law that says it's admissible, a statute that says it's admissible, then of course it opens up impeachment of the defendant with his priors, if applicable." Defense counsel replied, "Your Honor, I'm aware that if I bring in those witnesses, obviously with relation to, with—relative to a number of aspects of his past, I open the door to that, I understand." The trial court concluded the discussion by telling defense counsel, " . . . I'm going to need some authority for you—from you as to this issue . . . ."

Defendant's counsel never revisited the issue.

Defendant contends the trial court erred in excluding his defense witnesses.

The trial court did not exclude the testimony of defendant's witnesses, but merely required some authority establishing relevance before it could be admitted. (Evid. Code, § 350 [only relevant evidence is admissible]; *People v. Green* (1980) 27 Cal.3d 1, 19 ["the trial court is vested with wide discretion in determining relevance"], overruled on other grounds as stated in *People v. Morgan* (2007) 42 Cal.4th 593, 607.) We presume that if defendant's counsel had provided the authority,[5] the court would have permitted the witnesses to testify. Counsel did not do so, for reasons upon which we can only speculate. Defendant therefore forfeits the claim. (See *People v. Ramirez* (2006) 39 Cal.4th 398, 472 ["In order to preserve an issue for review, a defendant must not only request the court to act, but must press for a ruling. The failure to do so forfeits the claim."].)

Defendant argues that trial counsel's failure to re-raise the issue constituted ineffective assistance of counsel. The argument is without merit.

A claim that counsel was ineffective requires a showing by a preponderance of the evidence of objectively unreasonable performance by counsel and a reasonable probability that but for counsel's errors, the defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) The defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid*.) To prevail on an ineffective assistance claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

Defendant does not explain how the record affirmatively discloses lack of a rational tactical purpose for the decision not to press for admission of character testimony. For all we know, counsel had good reason not to re-raise the issue. One explanation is that the witnesses were unavailable. Another is that their evidence was not as strong as counsel had hoped. Another is that counsel realized that negative evidence introduced by the prosecution in rebuttal would outweigh any beneficial effect the

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[5] For example, Evidence Code, section 1102.

character testimony might have. Absent some indication in the record that defense counsel could have had no sound reason to act as he did, defendant's ineffective assistance claim fails.

I. Cumulative Error

Defendant contends that even if any of the claimed errors individually do not mandate reversal, the cumulative effect of such errors denied him his right to a fair trial. Because we find no error, the claim is rejected.

J. Corrections to the Judgment

The parties bring several deficiencies in the judgment and abstract to our attention. First, both sides agree the $10,000 parole revocation fine imposed in this case should be stricken because defendant was sentenced to life without the possibility of parole. Second, both sides agree the ten-year gang enhancement must be stricken from defendant's sentence. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [a sentence for first degree murder "is not subject to a 10-year enhancement under section 186.22(b)(1)(C)"].) Third, the People note that although the abstract of judgment correctly reflects defendant's sentence, no box setting forth statutory authority for the sentence is checked. The People ask that the abstract be corrected. Defendant does not oppose the measure. Finally, on August 18, 2010, defendant was ordered to make restitution to Jocelyn S. and the Victim Compensation and Government Claims Board for the costs of Franklin's funeral, in the amount of $5,799.93 to Jocelyn S. and $1,322.84 to the victim claims board, yet no such order appears in the abstract of judgment. The People ask that the oversight be corrected. Defendant does not oppose the request.

We will order that these four changes be made to the judgment and abstract of judgment.

DISPOSITION

The judgment is modified by striking the $10,000 parole revocation fine and the ten-year gang enhancement from defendant's sentence, and by adding citations to sections 190.03, subdivision (a), and 190.2, subdivision (a)(16) as authority for defendant's sentence of life without parole. As so modified, the judgment is affirmed.

The superior court is directed to prepare an amended abstract of judgment to reflect the judgment as modified, and also to reflect the order that defendant make restitution in the amount of $5,799.93 to Jocelyn S. and $1,322.84 to the Victim Compensation and Government Claims Board. The superior court is directed to forward a corrected copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.